IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7406 of 2001

WITH

CIVIL APPLICATION No 10727 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AYESABEN NUR MOHAMMAD

Versus

COMPETENT AUTHORITY

Appearance:

1. Special Civil Application No. 7406 of 2001

MR SH SANJANWALA FOR MR RS SANJANWALA for Petitioner.

MR DHAVAL BAROT, Addl. Standing Counsel for Respondents.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 25/08/2004

CAV JUDGEMENT

The petitioner has filed this petition under Article 226 of the Constitution of India challenging the

order passed by the Competent Authority under Sections 7 & 9 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short "SAFEMA Act") dated 26.11.1999 forfeiting the properties of the petitioner and the order passed by the Appellate Tribunal dated 20.07.2001 confirming the order of the Competent Authority. The petitioner has also challenged the order of detention passed against Shri Umer Haji Hasan Subhaniya (for short "the detenue") dated 29.12.1988 on the ground that the said order of detention is not valid and/or already revoked and/or not executed and hence, the SAFEMA Act is not applicable to the petitioner.

2. Civil Application No. 10727 of 2001 is filed by the petitioner praying for direction to the respondent No.1 i.e. Competent Authority to return back the possession of two vessels, namely, MSV Shahe Al Bukhari BDI 74 and MSV Shahe Al Mehboob BDI 724 seized and attached by the respondents on such terms and conditions as may be deemed just and expedient. The petitioner has also prayed for stay against the respondents restraining them from transferring or creating third party rights by alienating the said two vessels and has also sought for the permission to ply the said two vessels on such terms and conditions as may be deemed just and expedient.

3. The brief facts giving rise to the present petition are that the petitioner is the wife of Shri Umer Haji Hasan Subhaniya, who was detained under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (for short "COFEPOSA Act") by an order dated 29.12.1988. The said order of detention was challenged by the detenue before the Calcutta High Court and the stay was obtained against the execution of the said order. The said order of detention was revoked by the Competent Authority on 12.12.1989. Thus, the order of detention has not been executed against the detenue. The detenue has not undergone the detention by virtue of the stay granted by Calcutta High Court and before its period expired, the order was revoked and hence, there was no order of detention in the eye of law.

4. It is the say of the petitioner that by virtue of the order passed against the detenue, the petitioner was served a notice under Section 6 of SAFEMA Act and the order was passed by the Competent Authority on 26.11.1999 whereby the Competent Authority has come to the conclusion that the two vessels mentioned in the notice under Section 6 of the SAFEMA Act were liable to be forfeited being illegally acquired properties. The petitioner being aggrieved by the said order filed an

appeal before the Appellate Tribunal and the Appellate Tribunal vide its order dated 20.07.2001 has confirmed the order of the Competent Authority.

5. It is also the say of the petitioner that the properties which are forfeited were acquired by the petitioner much prior to the detention order having been passed against the detenue. The said properties were given by the detenue to the petitioner as prompt dower as the owner. The petitioner had filed Civil Suit No. 62 of 1984 in this connection and by judgment and decree dated 24.04.1986, the Civil Court has come to the conclusion that the said two vessels are the properties of the petitioner. The said decree has not been challenged by anybody and has become final. It is, therefore, contended by the petitioner that even before the notice under SAFEMA Act was issued and before the order of detention was passed against the detenue, these properties have become the properties of the petitioner and there was no question of declaring them as illegally acquired properties.

6. It is also the say of the petitioner that with regard to the said two vessels, no objection certificate was not being issued by the Customs Authority and hence, the petitioner has filed Special Civil Application No. 1147 of 1989 which was then converted into S.C.A. No. 1390 of 1990 seeking direction against the Custom Authority to issue no objection certificate on the basis that the said properties were the properties of the petitioner and the detenue had nothing to do with the same and for the relief that the representation filed by the petitioner may be considered expeditiously by the Customs Department. The said petition was disposed of by this Court on 20.02.1990 giving direction to the Custom Authority to consider the representation of the petitioner. Thereafter, the representation filed by the petitioner was considered by the Assistant Collector, Jamnagar and vide his order dated 13.12.1990, he has come to the conclusion that the representation was liable to be rejected and the Port Clearance could not be issued.

7. Being aggrieved by the said order, the petitioner filed an appeal before the Collector and by his order dated 30.07.1991, the Collector has allowed the said appeal and directed the Assistant Collector to issue Port Clearance Certificate. Against the said order of the Collector, an appeal was filed before CEGAT by the Collector Customs, Ahmedabad and the said appeal was dismissed by CEGAT vide its order dated 16.03.1992 wherein it was held that the petitioner was entitled to

the No Objection Certificate and the CEGAT has also specifically observed in the said order that the petitioner had acquired the said vessels much prior to the order of detention passed against the detenue.

8. In the above factual background of the matter, the petitioner has challenged in this petition, the order passed by the Competent Authority under Section 7 of the SAFEMA Act on 26.11.1999 as well as the order passed by the Appellate Tribunal on 20.07.2001 confirming the order of the Competent Authority.

9. Mr. S.H. Sanjanwala, learned Senior counsel appearing on behalf of the petitioner has submitted that the order of detention has not been executed against the detenue. The detenue obtained the stay against the execution of the order of detention, from the Calcutta High Court and before the expiry of period of one year of detention, the same was revoked by the Authority passing the order of detention under Section 11 of COFEPOSA Act. The order of detention having been revoked, there was no valid order of detention in the eye of law on which the SAFEMA proceedings could be sustained. Once the order of detention is revoked, SAFEMA Act would not be applicable to such a revoked order and SAFEMA proceedings cannot be based on such a revoked order. Once the order of detention is revoked, it becomes nullity in the eye of law. In support of this contention, he has relied on the Division Bench decision of this Court in the case of NIRANJAN DAHYABHAI CHOKSHI AND ANOTHER V/S. UNION OF INDIA AND ORS., 1992 (33) 2 G.L.R. 891 wherein it is held that " A valid order of detention under COFEPOSA is a pre-requisite for the issuance of the proceedings under SAFEMA and that initiation of proceedings under Sections 6 & 7 of SAFEMA would pre-suppose a valid order of detention under COFEPOSA. He has, therefore, submitted that in view of the order of revocation passed by the Competent Authority before the expiry of the period of one year and before it was executed, the SAFEMA proceedings are vitiated on the face of it and the order under Section 7 of SAFEMA as well as the order of the Appellate Tribunal are illegal and could not be sustained.

10. Mr. Sanjanwala has further submitted that the order of detention passed against the detenue is patently bad and illegal. If the Competent Authority wanted to base the SAFEMA proceedings on the order of detention of the detenue, it was mandatory for them to have served a copy of the said order on the petitioner especially when the order of detention was not even served on the detenue

and its execution was stayed. He has, therefore, submitted that the SAFEMA proceedings initiated by the Competent Authority are against the principles of natural justice and hence, both the orders based on such illegal proceedings are required to be quashed and set aside.

11. Mr. Sanjanwala has further submitted that the Appellate Tribunal has committed an error of law in holding that unless and until the order of detention is revoked as per the contingencies mentioned in Section 2 of SAFEMA, it cannot be said that there is a revocation order and that the order of revocation under Section 11 of COFEPOSA is of no avail for saying that SAFEMA is not applicable. While taking this view, the Tribunal has referred to the decision of this Court in the case of KARIMABEN K. BAGAD V/S. STATE OF GUJARAT, 1997 (38) 2 G.L.R. 1595. This decision of this Court was challenged before the Hon'ble Supreme Court and vide its order and judgment reported in 1998 (6) S.C.C. 264, it is held that "In the present case the order of detention was challenged by the husband of the petitioner on various grounds at the appropriate time. The High Court declined to go into the merits of the case being of the opinion that since the order of detention had been revoked, the writ petition had been rendered "infructuous". The High Court returned no finding on the merits of the challenge to the order of detention. When proceedings under SAFEMA were initiated against the petitioner, after the death of her husband, she could question the correctness of the grounds of detention while assailing the order of detention since a valid order of detention is a condition precedent for initiating proceedings under SAFEMA. To deny her that right on the ground that after twenty years, the challenge to the order of detention could not be revived, was unjust and improper."

12. Over and above this, Mr. Sanjanwala has further relied on the latest decision of the Hon'ble Supreme Court in the case of NARENDRA KUMAR V/S. UNION OF INDIA & ORS. passed in Criminal Appeal No. 1046 of 1997 decided on 24.02.2004 wherein the Hon'ble Supreme Court after relying on the judgment in the case of Competent Authority, Ahmedabad V/s. Amritlal Chandmal, Ahmedabad 1998 (5) S.C.C. 615 and Karimbhai K. Bagad V/s. State of Gujarat 1998 (6) S.C.C. 264 has held that if a challenge to the detention order is not decided on merit by the courts in Habeas Corpus writ petition and the said writ petition is dismissed solely on the ground that it had become infructuous that would not preclude the aggrieved party from challenging the detention order in a subsequent writ petition for the purpose of avoiding the

proceedings under the SAFEMA Act.

13. Mr. Sanjanwala has relied on the decision of this Court in the case of KARIMABEN K. BAGAD V/S. STATE OF GUJARAT passed in S.C.A. No. 3436 of 1996 on 29.03.2004 after it is remanded by the Hon'ble Supreme Court, wherein this Court has come to the conclusion that for exercise of powers under SAFEMA, the existence of valid order under COFEPOSA is a must. The Court has further taken cognizance of the fact that the order passed under the COFEPOSA was challenged before this Court and since there was delay in passing the order, the learned Public Prosecutor recommended to the State Government to withdraw/revoke the said order. The proposal was accepted and the order was revoked under Section 11 of the Act. In the said background, the Court was of the view that when the order under the COFEPOSA was revoked under Section 11 of the Act, then in that event, there was no need of valid reason for exercising power under SAFEMA. The Court has, therefore, held that the order under SAFEMA has to fall on the ground of non existence of a valid order under the COFEPOSA.

14. Mr. Sanjanwala has further relied on the decision of this Court in the case of GHELUBHAI R. MADAM THROUGH HEIRS AND LRS. V/S. A.K. MEHTA OR HIS SUCCESSOR, COMPETENT AUTHORITY AND SAFEMA/NDPS, MUMBAI & ORS, 2004 (2) G.L.R. 1431 wherein it is held that when the proceedings under Section 6 (1) of SAFEMA are required to be based on orders of SAFEMA and when the detention order was not in existence, nor it lasted for its term unchallenged, then the proceedings under SAFEMA could not have been undertaken against the detenue. Therefore, the notice under Secs. 6 (1) and order u/S. 7 of SAFEMA both have to be treated to be illegal. The Court has further held that the order of detention cannot be sustained in the eye of law, and consequently, and independently the proceedings under SAFEMA in general, and notice under Sec. 6 (1) of the Act and consequent order under Sec. 7 of the said Act in particular, are also illegal, and therefore, they are required to be quashed and set aside.

15. Mr. Sanjanwala has further submitted that even on the merits of the matter, the orders passed by the Competent Authority as well as by the Tribunal are not sustainable as both the authorities have erred in coming to the conclusion that the two vessels were illegally acquired properties. This conclusion on the face of it cannot be sustained as there was a decree of the competent Civil Court in favour of the petitioner and the

Tribunal is absolutely wrong when it observed that the said decree was collusive and, therefore, no effect can be given to the said decree. At no point of time, the said decree was challenged by anybody in any competent Court and is not set aside. There is no question of branding the said decree as a collusive decree when there was nothing on record either by an evidence or contention. This finding given by the Tribunal is contrary to the finding given in the Customs proceedings in which CEGAT has come to the conclusion that in view of the decree passed by the competent Court, the petitioner has become the owner of the vessels even before the detenue was detained under the COFEPOSA order or even before the SAFEMA notice was issued. In view of this clear factual position, the said properties cannot be said to be illegally acquired properties and they had no relation with the detenue. In support of this submission, he has relied on the decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of ATTORNEY GENERAL FOR INDIA AND OTHERS V/S. AMRUTLAL PRANJIVANDAS, 1994 (5) S.C.C. 54 wherein it is held that even before issuing the notice or while giving reasons, nexus has to be established between the property sought to be forfeited and the activities of the detenue. There is no indication in the notice under Section 6 or in the reasons recorded in the writ or even in the order passed under Section 7 of SAFEMA that there was such nexus. On the contrary, it has come on record that even before the activities of the detenue had started, properties had become the properties of the petitioner by virtue of the decree of the competent Civil Court and the detenue has ceased to be the owner thereof. Mr. Sanjanwala has further submitted that since there was no nexus, the authorities under SAFEMA have wrongly come to the conclusion that these are illegally acquired properties. The orders of the Competent authority as well as Appellate Tribunal are even otherwise erroneous and bad in law. The order of detention is patently bad and illegal even on the ground that for the alleged incident, for which the COFEPOSA order has been passed, the detenue has been acquitted by the competent Criminal Court. He has, therefore, submitted that since the order of detention was based on non-existing ground, the SAFEMA proceedings could not have been initiated against the petitioner.

16. Mr. Dhaval Barot, learned Additional Standing Counsel appearing for the respondents has strongly opposed to the present petition and raised certain preliminary issues against the maintainability of the petition. He has relied on the reply filed by the

Inspecting Officer. He has submitted that the petitioner has suppressed the material facts regarding non-production of copy of writ petition filed before the Calcutta High Court, copy of final order passed by the Calcutta High Court, in the writ petition and the precise statement of the fact as to whether the stay granted by the Calcutta High Court was against execution and operation of detention order. The petitioner had admitted that the detenue did not surrender and, therefore, neither the detenue nor his relatives are entitled to challenge the detention order. The challenge to the detention order is barred in view of a Constitutional Bench judgment passed in Criminal Appeal No. 621 of 2000 arising out of S.L.P. (Criminal) No. 3773 of 1991 in case of SAYED JAHER BAWAMIYA V/S. JOINT SECRETARY TO THE GOVERNMENT OF INDIA AND OTHERS. He has further submitted that the proceedings under SAFEMA were initiated on 23.10.1989 and after 11 years, the detention order was challenged which is not only barred but equitable jurisdiction of this Court cannot be invoked by petitioner. He has further submitted that there are concurrent finding of facts of two lower authorities and this Court should not exercise powers under Article 226 of the Constitution of India for reappreciation of evidence and should not interfere with the fact finding inquiry already undertaken by the authorities below.

17. Mr. Barot has further submitted that the revocation of the detention order was not on the report of the Advisory Board or within contingency as stipulated under the statute and, therefore, such an order of detention which is subsequently revoked, can still be made as basis for initiating the proceedings under the provisions of the SAFEMA. The said revocation order was not covered by any contingencies provided under Section 2(2)(b) of the SAFEMA. The acquittal of the detenue has no bearing in this case as the proceedings under the provisions of SAFEMA had been initiated on the basis of the detention order of the detenue. The revocation under Section 11 of COFEPOSA does not fall within the contingencies provided under the Provisions of SAFEMA for initiating the proceedings in respect of the illegally acquired properties.

18. Mr. Barot has further submitted that the petitioner had not set up the plea before the Competent Authority that the property was acquired by virtue of decree. At any rate, the transfer was not bona fide and the petitioner has failed to prove that the acquisition of the vessels by the detenue was through legal sources. He relied on the observations made by the Appellate

Tribunal wherein it is held that the collusive suit was filed for the purpose of defeating the provisions of the SAFEMA by the detenue and the transfer of the vessel was not in good faith and the decree was obtained through a collusive suit and, therefore, the forfeiture order passed by the Competent Authority was confirmed by the Appellate Tribunal. The detention order was issued by the Central Government against the detenue with a view to prevent him from smuggling activities. The revocation of the detention order is not at all covered by any of the contingencies of proviso 1 to 4 as provided under Section 2(2)(b) of the SAFEMA. The Provisions of the Act have been incorporated and brought in force with a different purpose i.e. to deprive all the ill-gotten wealth and assets of the smugglers i.e. foreign exchange manipulators which has been amassed through smuggling activities and where such illegal properties are in the name of detenue himself or in the name of his relatives and associates. The petitioner at no stage during the proceedings could prove that the impugned properties were acquired from known and legal sources of income. Both the forfeited vessels were purchased by the detenue himself in his own names which were subsequently transferred in the name of the petitioner and this fact clearly speaks the truth that the original investments made by the detenue towards impugned properties were traceable to be illegally acquired properties.

19. Mr. Barot has strongly relied on the Constitutional Bench decision of the Hon'ble Supreme Court in the case of ATTORNEY GENERAL FOR INDIA AND OTHERS V/S. AMRATLAL PRAJIVANDAS AND OTHERS, (1994) 5 S.C.C. 54 (Supra) for the proposition that an order of detention to which Section 12-A is applicable as well as an order of detention to which Section 12-A was not applicable can serve as the foundation, as the basis, for applying SAFEMA to such detenue and to his relatives and associates provided such order of detention does not attract any of the sub-clauses in the proviso to Section 2(2)(b). If such detenue did not choose to question the said detention (either by himself or through his next friend) before the Court during the period when such order of detention was in force, or is unsuccessful in his attack thereon, he, or his relatives and associates cannot attack or question its validity when it is made the basis for applying SAFEMA to him or to his relatives or associates. Mr. Barot has, therefore, submitted that the order of detention was not originally challenged and hence, it is not open for the present petitioner to attack or question the validity of the said order when it is made basis for applying SAFEMA to the petitioner.

20. Mr. Barot has further relied on the decision of this Court in the case of KARIMABEN K. BAGAD V/S. STATE OF GUJARAT, 1997 (38) 2 G.L.R. 1595 (SUPRA) wherein it is held that a reading of Sec. 2 of the SAFEMA clearly shows that only contingencies which would take away the jurisdiction of the authorities under the Act against the persons are those as contemplated by the priviso (i) to (iv) of Sec. 2(2)(b) of the SAFEMA. Clause (a)(i) refers to revocation on the report of Advisory Board under Sec. 8 or before the receipt of the report of the Advisory Board or before making a reference to the Advisory Board. In case where Sec. 9 applies, it has not been revoked before expiry of the time or on the basis of review under Sub-sec. (2) of Sec. 9 or on the report of the Advisory Board under Sec. 8 read with sub-sec. (2) of Sec. 9. The third is, detention before expiry of time or on the basis of the first review under sub-sec. (3) or on the basis of the report of the Advisory Board under Sec. 8 read with sub-sec. (6) of Sec. 12A and the fourth is that the order of detention has not been set aside by the Court of competent jurisdiction. It is not the case of the petitioner that his case falls in any of the categories mentioned above. Thus, the revocation of detention is only under Section 11 of the COFEPOSA. It has to be borne in mind that all the four situations have been recognised in the statute where the Act would not or cease to apply in the event of detention order being revoked or set aside. Revocation under Sec. 11(i) of the COFEPOSA is not one of those contingencies as contemplated by law. He has further submitted that SAFEMA is a special piece of legislation dealing with specified situation and as such it is not possible to go beyond the scope of exceptions created by the proviso (i) to (iv) to Sec. 2(2)(b) of SAFEMA and take note of the revocation orders which are of the general nature passed under Sec. 11(i) of the COFEPOSA to hold that jurisdiction of that competent authority to proceed on the basis of the said detention order ceases to exist because to do so would be to contribute something to the intention of the legislature which was not there, because had it been so, there was nothing to prevent reference in the Act itself by adding revocation of detention under Sec. 11(i) of the COFEPOSA also to be drawn by way of additional proviso to Sec. 2(2)(b) of SAFEMA. Thus, the mere fact of revocation of detention order which generally falls outside the ambit of the proviso and Sec. 4 of the Act would be inconsequential so far as the proceedings under the SAFEMA are concerned.

21. Based on the aforesaid factual as well as legal

submissions, Mr. Barot has strongly urged that the order passed by the Competent Authority and confirmed by the Appellate Tribunal forfeiting the vessels illegally acquired by the detenue and collusively transferred in the name of the petitioner should not be interfered with by this Court while exercising its extra ordinary writ jurisdiction under Article 226 of the Constitution of India and that too after the expiry of the period of more than 11 years.

22. After having heard learned Senior advocate Mr. S.H. Sanjanwala for the petitioner and Mr. Dhaval Barot, learned Additional Standing Counsel for the respondents and after having perused their respective pleadings as well as the documentary evidence which were brought on record of this petition and the authorities cited, this Court is of the view that the petitioner deserves the relief which is prayed for in the present petition. It is an admitted position that the order of detention was challenged before the Calcutta High Court and stay was granted. Before the period of detention was over, the said order has been revoked. The order of detention was, therefore, not executed against the detenue. This Court has already taken the view that if the order of detention is revoked under Section 11(i) of COFEPOSA, the provisions of SAFEMA would not apply in that case. Since this Court is in the agreement with the view taken by this Court in the case of KARIMABEN K. BAGAD V/S. STATE OF GUJARAT, decided on 29.03.2004 (SUPRA) as well as in the case of GHELUBHAI R. MADAM THROUGH HEIRS AND LRS. V/S. A.K. MEHTA OR HIS SUCCESSOR, COMPETENT AUTHORITY AND SAFEMA/NDPS, MUMBAI & ORS, 2004 (2) G.L.R. 1431 (SUPRA), it is hereby held that when the detention order is not in existence, nor it lasts for its term unchallenged, the proceedings under SAFEMA could not have been undertaken either against the detenue or his relatives. The order of detention, therefore, cannot be sustained in the eye of law, and consequently and independently, the proceedings under SAFEMA in general, notice under Section 6(1) of the Act and consequent order under Section 7 of the Act passed by the Competent Authority and confirmed by the Appellate Tribunal are also illegal and, therefore, they are required to be quashed and set aside by allowing the present petition.

23. Assuming that even if the submission of Mr. Barot to the effect that the order passed by this Court in the case of KARIMABEN K. BAGAD V/S. STATE OF GUJARAT, decided on 29.03.2004 (SUPRA) is challenged in L.P.A. and the Division Bench of this Court has granted

stay against the said order, has some force, the fact still remains that in the present case, the petitioner has acquired the properties prior to the issuance of notice under Section 6(1) of the SAFEMA. The said property was acquired by the petitioner under the judgment and decree passed by the competent Civil Court. The said decree and judgment has become final. It is not just and proper for the Appellate Tribunal to hold that the said suit was a collusive suit and the decree was obtained in a fraudulent manner to avoid the proceedings under SAFEMA. The Court also takes note of the finding arrived at by the CEGAT holding that the property belonged to the petitioner and it was legally and lawfully acquired by the petitioner under the judgment and decree of the competent Civil Court. The Court is, therefore, of the view that not only on the legal ground bDut even on merits also, the petitioner is held to be legal owner of the properties in question and hence, neither the notice could have been issued against her nor the order of forfeiture could have been passed against the petitioner. Both the orders are, therefore, bad in law and contrary to the Provisions of the Act and evidence on record and hence, they are required to be quashed and set aside.

24. In the result, both the orders under challenge are hereby quashed and set aside and the petition is allowed accordingly. Rule is made absolute without any order as to costs. It is, however, clarified that since the Division Bench has admitted the L.P.A. No. 1130 of 2004 filed against the order passed in S.C.A. No. 3436 of 1996 and granted order of status-quo, the implementation and operation of the present order is stayed for two weeks from today so as to enable the Union of India to carry out this matter further if it so desires.

25. Since the present petition is allowed, C.A. No. 10727 of 2001 does not survive and it is accordingly disposed of.

Sd/-
[K.A. PUJ, J.]

#Savariya#

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